Supreme Court U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

REBECCA J. BROWN, On Behalf of Herself
and All Other Persons Similarly Situated,
Petitioner,

v.

NATIONSBANK OF GEORGIA, N.A.
and JOHN LITZLER,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an existing plan is essential to federal jurisdiction under ERSIA Coverage, 29 U.S.C. §1003(a)(1)?

2. Whether, in affirming the district court's federal jurisdiction under ERISA, the court of appeals decision that there is no "existing plan" should be instead a decision that "there is no federal jurisdiction," and thus not be in conflict with decisions of other courts of appeals that existence of a plan is essential to federal jurisdiction under ERISA Coverage, 29 U.S.C. §1003(a)(1)?

3. If there is federal jurisdiction under ERISA Coverage over a plan when there is no "existing plan," whether a participant, in a plan that failed to distribute plan assets as promised and due plan participants, is empowered to sue fiduciaries on behalf of the plan for losses to the plan resulting from fiduciary breach, as monetary damages, monetary equitable relief or monetary remedial relief, under ERISA, 29 U.S.C. §1104, §1109(a) and §1132(a)(2)?

TABLE OF CONTENTS

Description	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
DECISIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. Facts Material to Questions Presented	2
B. Proceedings Below	3
REASONS FOR GRANTING THE PETITION	4
I. Conflict with Other Courts of Appeal on Jurisdiction	5
II. Conflict with Other Courts of Appeal on Losses to Plan	6
III. The Court of Appeals Decision is Erroneous	9
IV. The Questions Presented are Important to the National Public Interest	11
CONCLUSION	13
APPENDIX A. Court of Appeals Order Denying Petition for Rehearing 12-18-98	1a
APPENDIX B. Court of Appeals Decision 10-6-98	2a
APPENDIX C. District Court Memorandum Order 12-9-97	6a

TABLE OF CONTENTS
(Continued)

Description		Page
APPENDIX D.	District Court Judgment 12-9-97	12a
APPENDIX E.	District Court Order 12-9-97.....	13a
APPENDIX F.	District Court Memorandum Order 10-1-97	14a
APPENDIX G.	District Court Memorandum Order 9-11-97	18a
APPENDIX H.	Statutory Pertinent Text - Title 28 U.S.C. §1254(l), §1446(a)	25a
APPENDIX I.	Statutory Pertinent Text - Title 29 U.S.C.	
	§1002(2)(A)and (3), ERISA §3(2)(A) and (3)	26a
	§1003(a)(1), ERISA §4(a)(1)	26a
	§1104, ERISA §404	27a
	§1109(a), ERISA §409(a)	27a
	§1132(a)(2), ERISA §502(a)(2)	28a
	§1132(d)(1), ERISA §502(d)(1)	28a
	§1144(a), ERISA §514(a)	28a

TABLE OF AUTHORITIES

Cases	Page
Barker v. American Mobil Power Corp,.64 F.3d 1397 (9th Cir. 1995)	8
Bongiorno v. Associates in Adolescent Psychiatry, S.C. 17 Emp. Benefits Cas. (BNA) 1847 (N.D. Ill. 1993)	6
Butler v. Polk, 592 F.2d 1293 (5th Cir. 1979)	10
California Division of Labor Standards Enforcement et al v. Dillingham Construction, N.A.,Inc., et al. 117 S.Ct. 832 (1997)	9, 10, 12
Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (*en banc*)	5, 6
Fink v. National Sav. And Trust Co., 772 F.2d 951 (D.C. Cir. 1985)	8
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Mertens v. Black, 948 F.2d 1105 (9th Cir. 1991)	8
Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599 (8th Cir. 1995)	8
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UIU Severance Pay Trust Fund v. Local Union No. 18-U 998 F.2d 509, (7th Cir. 1993)	6
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TABLE OF AUTHORITIES
(Continued)

Cases (Continued) **Page**

United States v. James, 478 U.S. 597, S.Ct. 3116
92 L.Ed.2d 483 (1986) 9
Whitt v. Sherman Int'l Corp., 147 F.3d 1325
(11th Cir. 1998) 6

Statutes and Rules

28 U.S.C. §1254(l) 1
28 U.S.C. §1446(a) 3

29 U.S.C. §1002(2)(A), ERISA §3(2)(A) 1
29 U.S.C. §1003(a)(1), ERISA §4(a)(1)..... i, 1, 2, 3, 9
29 U.S.C. §1104, ERISA §404..... i, 1, 4, 8
29 U.S.C. §1109(a), ERISA §409(a) ..... i, 1, 4, 7, 8, 11
29 U.S.C. §1132(a)(2), ERISA §502(a)(2) ..... i, 1, 4, 7, 8, 11
29 U.S.C. §1132(d)(1), §502(d)(1)..... 7
29 U.S.C. §1144(a), ERISA §514(a)..... 1, 9

Rule 23(a)(3) Federal Rules of Civil Procedure 8

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

REBECCA J. BROWN, On Behalf of Herself and All Other Persons Similarly Situated, *Petitioner,*

v.

NATIONSBANK OF GEORGIA, N.A. and JOHN LITZLER, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Rebecca J. Brown, on behalf of herself and all other persons similarly situated, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

DECISIONS BELOW

The decision of the court of appeals (App., *infra*, 2a-5a) is unreported. The decisions of the district court (App., *infra*,6a-24a) are unreported.

JURISDICTION

The court of appeals entered its decision on October 6, 1998 and denied Petitioner's petition for rehearing on December 18, 1998 (App., *infra*, 1a-5a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). (App., *Infra*, 25a)

STATUTORY PROVISIONS INVOLVED

Federal jurisdiction over employee pension benefit plans is governed by coverage of the federal Employee Retirement Income Security Act of 1974 (ERISA) §3(2)(A) and (3) and §4(a)(1) [29 U.S.C. §1002(2)(A) and (3) and §1003(a)(1)]. Preemption of state law is governed by the Act's §514(a) [29 U.S.C. §1144(a)]. Plan participants' suits on behalf of the plan are governed by the Act's §404, §409(a) and §502(a)(2) [29 U.S.C. §1104, §1109(a) and §1132(a)(2)]. (App., *infra*, 26a-28a)

STATEMENT

A. Facts Material to Questions Presented

The petitioner Rebecca J. Brown (Brown) was an employee of Wyatt Cafeterias, Inc. (company) that was headquartered in Dallas, Texas. In 1988, the company operated approximately 124 cafeterias in the southwest. Brown was one participant of approximately 5,000 participants in the Wyatt Cafeterias, Inc. Employees Stock Ownership Plan (plan or ESOP). The plan was established or maintained by the company under ERISA Coverage §4(a)(1), 29 U.S.C. §1003(a)(1) (App., *infra*, 26a), during the time from 1988 to 1995. The purpose of the plan was to provide participants with company stock to be worth as much as $150.00 per share within fifteen years, as additional or deferred compensation at the time of retirement.

In 1988, the respondents as trustees of the plan, in a leveraged acquisition, paid $78.13 per share for the legal title to the 2,000,000 shares of the company's voting corporate stock that was appraised at $84.00 per share. Through the respondents' fraud in deliberate mismanagement in the operation of the company, the company stock as the only asset in the plan became totally worthless in 1995.

Brown did not receive the plan distribution of company stock promised and due her, because of the bankruptcy of the company and the termination of the plan without assets effective December 31, 1995. The plan failed as a result of respondents' fraud in deliberate mismanagement of the company as its controlling shareholder. Respondents took unconscionable gain of evading liability for a financial obligation in excess of $150,000,000.00, and unconscionable gain of fees paid them for services that went unperformed.

The plan was a defined contribution plan that was not subject to the termination provisions of ERISA for defined benefit plans. Brown filed suit in Texas state court, after the plan was terminated and no longer existing under ERISA Coverage §4(a)(1),

29 U.S.C. §1003(a)(1) (App., *infra*, 26a), on August 9, 1996, seeking to recover the loss in the company's corporate stock based on state common law fraud, which is not related to, connected to, and which has no reference to, an existing employee benefit plan or to the regulation of existing employee benefit plans, against the respondents who held the legal title to the corporate voting stock of the company as the controlling shareholder and the entity responsible for the common law fraud in deliberate mismanagement of company assets.

B. Proceedings Below

Respondents removed this case from the Texas state court to federal court pursuant to 28 U.S.C. §1446(a) (App., *Infra*, 25a) on September 17, 1996 when there was no ERISA existing plan. The district court denied Brown's motion to remand in its decision September 11, 1997, deciding that Brown's:

> "... allegations require the court to examine and interpret the language of the instruments creating this ERISA-governed ESOP, the operation of the ESOP, and any communications made by the defendants to Brown concerning the terms of the ESOP" (App., *infra*, 23a) and that "removal is proper based on ERISA preemption of Brown's fraudulent inducement claim." (App., *infra*, 24a)

None of the district court's decisions refer to a state law being preempted, or to an examination and interpretation of the language of the instruments relating to operation and communications, such as respondents' failure to obtain and report annual valuations of the company stock, and similar failures to comply with obligations in the communications and operation of the company. (App., *infra*, 6a-24a)

The district court's decision October 1, 1997 granted respondents' motion to dismiss Brown's state law claim for compensatory and punitive damages, but denied the motion to

dismiss equitable relief, directing the parties to file further briefs on the availability of equitable relief under ERISA. (App., *infra,* 14a)

After respondents filed their further brief, Brown filed her response in the form of a motion for leave to file a first amended complaint to specify claims under ERISA.

When the respondents filed a motion to strike Brown's motion to amend, Brown filed her first amended complaint December 5, 1997 as a matter of right (because the respondents had not filed an answer), setting forth, among other alternative counts, Count II on behalf of the plan as a whole for losses to the plan resulting from fiduciary breach under ERISA §404, §409(a) and §502(a)(2) [29 U.S.C. §1104, §1109(a) and §1132(a)(2)]. (App., *infra*, 27a-28a)

The district court's decision two business days later on December 9, 1997 granted respondents' alternative motion for summary judgment on Brown's state law claims, against Brown's first amended complaint, by deciding her claims, including her claim on behalf of the plan, were for monetary damages not available under ERISA. (App., *infra*, 6a - 11a)

Brown timely appealed this decision to the United States Court of Appeals for the Fifth Circuit. After the case was submitted to the court of appeals on the briefs of the parties, the court of appeals filed its summary calendar decision October 6, 1998 affirming the decision of the district court, and among other things, deciding that there is no "existing plan" on behalf of which Brown could make a claim for losses to the plan resulting from fiduciary breach under ERISA §409(a), and further, that such losses were monetary damages not available to the plan under ERISA §502(a). (App., *infra*, 4a)

The court of appeals denied Brown's petition for rehearing in its order filed December 18, 1998. (App., *infra*, 1a)

REASONS FOR GRANTING THE PETITION

Conflicting decisions on the questions presented continue in the district courts and the different courts of appeals, and the need

for more guidance from the Court is clear and present. This case is a timely opportunity to provide that guidance, because there are procedural reasons, such as, time constraints, why few of the district court and the courts of appeals decisions receive appellate review. Generally, employees as working individuals have inadequate financial resources to pursue appellate review to obtain the protection the law should afford them. These factors combine to make appellate review of decisions on the issues limited in comparison to the number of lower court decisions on the issues. In addition, the decision below is erroneous, but the issues the decision addresses are important to the national public interest.

I. Conflict with Other Courts of Appeals on Jurisdiction

The decision of the court of appeals for the fifth circuit in this case affirming the district court's federal jurisdiction under ERISA when deciding there is no "existing plan" (App., *infra*, 4a) conflicts with decisions of other courts of appeals.

The court of appeals for the eleventh circuit has provided the leading case on federal jurisdiction based on ERISA coverage of an "existing plan" in *Donovan v. Dillingham*, 688 F.2d 1367, 1370, 1373 (11th Cir. 1982) (*en banc*):

> ". . . ERISA applies to any 'employee benefit plan' if it is established or maintained by any employer . . . engaged in commerce . . . ." and "In determining whether a plan . . . is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits."

None of these conditions determining "a plan is a reality" existed at the time of removal in the case at bar. Under the *Donovan* test there clearly was no "existing plan" in the case at bar at the time of removal, confirming that the part of the court of appeals decision that there is no "existing plan" is correct and not erroneous.

The *Donovan* case and similar cases in some of the other courts of appeals decide that if there is no "existing plan," the case is not covered by ERISA, there is no federal jurisdiction, and the case must be dismissed or remanded to state court upon removal. See *UIU Severance Pay Trust Fund v. Local Union No. 18-U*, 998 F.2d 509, 510, Note 2 (7th Cir. 1993); (existence of ERISA-governed plan is an essential precursor to federal jurisdiction). See also *Bongiorno v. Associates in Adolescent Psychiatry, S.C.*, 17 Emp. Benefits Cas. (BNA) 1847 (N.D. Ill. 1993); (existence of a benefit plan as that term is defined in ERISA is a jurisdictional requirement).

See also *Handbook on ERISA Litigation*, Second Edition, Aspen Law and Business, Division of Aspen Publishers, Inc., 1994, 1999 Supp., §1.01 and §1.01A, pp. 1-3 to 1-6.

A plan that existed at a time other than at the time of removal, such as, the antecedent plan in the case at bar, is not an "existing plan" conferring federal jurisdiction. See *Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325, 1333 (11th Cir. 1998):

> ". . . no ERISA plan existed at the time of removal, and further, that retroactive application of the subsequently adopted ERISA plan would be inappropriate in this case, the preemption doctrine does not apply, federal jurisdiction cannot be found, and the district court's summary judgment was a nullity."

Under *Whitt*, in the case at bar, no ERISA plan existed at the time of removal, there was no federal jurisdiction and the district court's summary judgment was a nullity.

The Court should grant Brown's petition to resolve this conflict in the courts of appeal and correct the error of the court of appeals for the fifth circuit.

II. Conflict with Other Courts of Appeals on Losses to Plans

If there is federal jurisdiction under ERISA Coverage over

a failed plan when it is not an "existing plan," the failed plan in this case must be an ERISA entity. The district court's jurisdiction over this case must be predicated on the failed plan being an entity in this case as an "ERISA-governed ESOP," described in the district court's September 11, 1997 decision. (App., *infra*, 23a) If the respondents are covered by ERISA, then, the failed plan must be covered by the provisions of ERISA, and the failed plan is an entity upon which a participant may sue on behalf of, in the same manner that respondents as trustees and the petitioner as a plan participant were construed as ERISA entities by the district court. Under ERISA §502(d)(1), 29 U.S.C. 1132(d)(1), (App., *infra*, 28a), a plan is an entity and service upon a trustee constitutes service upon the plan. ERISA Coverage must be over a plan that is an ERISA entity.

The decision of the court of appeals for the fifth circuit affirming the district court's grant of summary judgment against Brown, then, conflicts with decisions of other courts of appeals, by deciding, first, the failed plan no longer existed and, second, that Brown sought monetary damages on behalf of the plan that had failed, and that monetary damages are not available to the plan under ERISA. (App., *infra*, 4a)

Interestingly, the court of appeals decision misquotes *Sanson v. General Motors*, 966 F.2d 618 (11th Cir. 1992) as being about a claim on behalf of a plan. *Sanson* is about a claim of recovery for only one individual and preemption of Georgia state law, and not about a claim on behalf of a plan. (App., *infra*, 4a)

The following cases decided that a plan that failed can recover losses to the plan from fiduciary breach as monetary damages, monetary equitable relief or monetary remedial relief (to remedy a wrong or loss) under ERISA §409(a), 29 U.S.C. 1109(a) (App., *infra*, 27a-28a):

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 147, 105 S.Ct. 3085, 3092-93, 87 L.Ed.2d 96 (1985);(monetary damages relief authorized under ERISA §409(a) is not available to an individual recovery that is not a recovery for the plan as a whole, but monetary damages is available on behalf of the plan as a whole, and arises for violations of fiduciary general duties under ERISA §404, such as, mismanagement of plan assets).

Fink v. National Sav. And Trust Co., 772 F.2d 951 (D.C. Cir. 1985); (trustees failure to investigate and evaluate investments would be grounds for recovery of trustees fees paid for services that went unperformed, Judge Scalia at 962).

Mertens v. Black, 948 F.2d 1105 (9th Cir. 1991); (participants in failed Kaiser Steel Retirement Plan were empowered to sue fiduciaries for fiduciary breach to recover loss suffered by the plan as a whole under ERISA Sections 1109 and 1132(a)(2)).

Martin v. Feilen, 965 F.2d 660,671,672 (8th Cir. 1992) *cert. denied*, 506 U.S. 1054 (1993); (ERISA §409(a) may "restore plan participants to the position in which they occupied but for the breach of trust" where sponsoring employer's stock, as the only ESOP asset, became worthless).

*Barker v. American Mobil Power Corp.*64 F.3d 1397, 1404 (9th Cir. 1995):

> ". . . the fact that no funds were available to pay the participants, who had been assured of the existence of those funds, was probative evidence that the funds were not properly maintained."

Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599, 601,602 (8th Cir. 1995); (monetary loss is recoverable for ESOP whose assets became worthless).

Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1455, 1462 (9th Cir. 1995); (participants can sue under Section 1132(a)(2) on behalf of plan that failed as beneficiaries to enforce the right of the plan against fiduciaries to properly seek damages for the plan and class certification under Rule 23(a)(3)).

See also *Handbook on ERISA Litigation*, Second Edition, Aspen Law and Business, Division of Aspen Publishers, Inc., 1994, 1999 Supp., §3.05 C, p. 3-104:

> "monetary damages for breach of fiduciary duty is provided within ERISA §409(a) . . ." and "Because ERISA does not define 'loss,' courts look to common law principles and remedies under trust law in determining the measurement of damages."

The Court should grant Brown's petition to resolve this conflict in the courts of appeal and correct the error of the court of appeals for the fifth circuit.

III. The Court of Appeals Decision is Erroneous

The decision of the court of appeals for the fifth circuit in this case affirming the decision of the district court is erroneous because statutory language is clear that the district court had no federal jurisdiction. Further, if there is federal jurisdiction over the failed plan when it is not an "existing plan," the failed plan is an entity in this case. Brown as a plan participant was empowered to sue on behalf of the plan that failed, as a entity in this case, for losses to plan assets from fiduciary breach, as monetary damages, monetary equitable relief or monetary remedial relief.

When courts interpret statutes, the initial inquiry is the language of the statute itself. See *United States v. James*, 478 U.S. 597, 604, 106 S.Ct. 3116, 3120, 92 L.Ed.2d 483 (1986); *United States v. Barlow*, 41 F.3d 935, 942 (5th Cir. 1994) *cert. denied*, ____ U.S. ____, 115 S.Ct. 1389, 131 L.Ed. 2d 241 (1995).

The clear language of the statute confers no federal jurisdiction in this case, because of the unambiguous present tense in ERISA Coverage §4(a)(1), 29 U.S.C. §1003(a)(1), describing coverage of the act as being over any plan that "is" currently established or maintained by an employer in commerce, and not otherwise. (App., *infra*, 26a) At the time of removal in this case, there was no employer establishing or maintaining an "existing plan." Clearly when there is no "existing plan" there is no coverage by ERISA, there is no plan to "relate to" under the ERISA preemption of §514(a), 29 U.S. §1144(a) and there is no federal jurisdiction. (App., *infra*, 28a)

Even if there were an "existing plan," Texas state common law fraud does not relate to a plan because it does not regulate employee benefit plans, and an "existing plan" is not essential to invoke state common law fraud. See *California Division of Labor Standards Enforcement et al. v. Dillingham Construction, N.A., Inc.*,

et al., *infra*, 12. See also *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979); (It is axiomatic that ambiguities are generally construed against removal).

If there is federal jurisdiction under ERISA Coverage over a failed plan when it is not an "existing plan," the failed plan in this case must be an ERISA entity. The district court's jurisdiction over this case must be predicated on the failed plan being an entity in this case as an "ERISA-governed ESOP," described in the district court's September 11, 1997 decision. (App., *infra*, 23a) If the respondents are covered by ERISA, then, the failed plan must be covered by the provisions of ERISA, and the failed plan is an entity upon which a participant may sue on behalf of, in the same manner that respondents as trustees and the petitioner as a plan participant were construed as ERISA entities by the district court. Under ERISA §502(d)(1), 29 U.S.C. 1132(d)(1), (App., *infra*, 28a), a plan is an entity and service upon a trustee constitutes service upon the plan. ERISA Coverage must be over a plan that is an ERISA entity.

The clear language of the statute in ERISA §502(a)(2), 29 U.S.C. §1132(a)(2), referring to ERISA §409(a), 29 U.S.C. 1109(a), containing the words "make good to [the] plan any losses," mean that a plan participant is empowered to sue fiduciaries on behalf of the plan that failed, for losses from fiduciary breach, as monetary damages, monetary equitable relief or monetary remedial relief. (App., *infra*, 28a-28a) Losses in plan assets are monetary. The meaning of the word "losses" in the statute has the same monetary meaning as the accounting term "Profit and Loss" has monetary meaning. The meaning is the same whether designated "losses," "monetary damages," "monetary equitable relief" or "monetary remedial relief." The meaning of the statute is confirmed by case law authorities. See "II. Conflict with other Courts of Appeals on Losses to Plans," *supra*, 6.

See also the conclusion in the district court's December 9, 1998 decision that Brown's ". . . claim is one for damages if it seeks monetary relief for losses an ERISA plan sustained as a result of an alleged breach of fiduciary duties." (App. *Infra*, 9a) This conclusion adopts the ERISA statutory meaning of the term "losses" to a plan as "damages," and should have permitted Brown's claim for these

losses on behalf of the plan to go to trial.

The decision of the court of appeals that the "Supreme Court has held that monetary damages (i.e., legal relief) are not available under ERISA §502(a)'s carefully crafted civil enforcement" (App., *infra*, 4a) contradicts the Court's decision in *Russell, supra* 7, is a contradiction of the language in ERISA §409(a) and §502(a)(2),29 U.S.C. §1109(a) and §1132(a)(2), and is patently incorrect and erroneous. Congressional intent clearly is that fiduciaries are to make good any losses to plan assets resulting from fiduciary mismanagement of plan assets, in terms of monetary damages, monetary equitable relief or monetary remedial relief. See Note 8 in *Russell.*

See also *Handbook on ERISA Litigation*, Second Edition, Aspen Law and Business, Division of Aspen Publishers, Inc., 1994, 1999 Supp., §3.05 C, p. 3-104:

> "monetary damages for breach of fiduciary duty is provided within ERISA §409(a) . . ." and "Because ERISA does not define 'loss,' courts look to common law principles and remedies under trust law in determining the measurement of damages."

The decision of the court of appeals affirming the district court's federal jurisdiction and summary judgment for respondents should be reversed, and this case remanded to the district court for remand to the Texas state court, or, in the alternative, for trial on the merits.

IV. The Questions Presented are Important to the National Public Interest

With the current proliferation of business mergers and acquisitions, and attendant business failures resulting from mismanagement of assets, literally hundreds of thousands of employees are involved and subject to dislocation. Large numbers of employees subject to dislocation is a matter of grave national public interest. The acquisition or merger of Exxon and Mobil is a prime

example. Houlihan Lokey's Mergerstat, reports 7,758 mergers or acquisitions in 1998 compared to 3,510 in 1995, according to the article "Mergers may hurt firms, experts say," in *The Dallas Morning News*, January 10, 1999, p. 1 and p. 19A. More and more questions similar to the questions presented will arise about ERISA plans, ERISA coverage, ERISA federal jurisdiction, ERISA peemption of state law and ERISA relief.

In *California Division of Labor Standards Enforcement et al. v. Dillingham Construction, N.A., Inc., et al.*, 117 S.Ct. 832, _____ (1997), Justice Scalia and Justice Ginsburg noted in a separate opinion that the Court has decided:

> "no less than 14 cases to resolve conflicts in the Courts of Appeals regarding ERISA peemption of various sorts of state law with two more ERISA peemption cases so far this term."

The Court's decisions have not been as effective and definitive as the Court could have wanted them to be. The justices suggest that the federal courts have gone too far in accepting the curbstone philosopher's "everything is related to everything else." They further suggest that the Court do more to clarify that the "relate to" clause is meant to identify state laws regulating employee benefit plans. In many cases, often in spite of dissenting opinion, the federal lower courts have not made the interpretation of a "sensible person" as intended by the law and the Court.

Congressional intent was for exclusive federal regulation of employee benefit plans, so that only state laws regulating employee benefit plans are to be preempted. See *Handbook on ERISA Litigation*, Second Edition, Aspen Law and Business, Division of Aspen Publishers, Inc., 1994, 1999 Supp., §2.03, p. 2-5, Note 19:

> "U. S. Representative Dent, who sponsored ERISA in the House, referred to ERISA's preemption provisions as follows: 'Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate... employee benefit plans...round[ing] out the protection afforded participants . . . . '

> According to Senator Williams, also an ERISA sponsor, the preemption provisions were 'intended to preempt the field for Federal regulations . . . .'" (Emphasis added)

Many lower court decisions are so overly focused on variable meanings of "relate to," "connected with" or "reference to" preemption of state law, and endless, irrelevant misapplications of meanings for "plan," "damages," "legal relief," "equitable relief," "remedial relief" and "monetary relief" that even the most obvious fundamentals of federal jurisdiction, preemption, damages, legal relief, equitable relief, remedial relief and monetary relief, are inadvertently or otherwise overshadowed and ignored.

In line with the suggestion of Justice Scalia and Justice Ginsburg, the case at bar may be a rare opportunity for the Court to do more to clarify an ERISA plan, ERISA coverage, ERISA federal jurisdiction, ERISA peemption of state law and ERISA relief. Such clarity would result in the federal lower courts adopting a clearer, more consistent and predictable interpretation of ERISA for protection afforded employees, that a "sensible person" can understand, honor and accept, as the law and the Court intended. The Court, therefore, should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

U.S. COURT OF APPEALS
FILED
DEC 18 1998
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 98-10034

REBECCA J BROWN, On Behalf of Herself and All Other Persons Similarly Situated

Plaintiff - Appellant

v.

NATIONSBANK OF GEORGIA NA; JOHN LITZLER

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before DAVIS, DUHÉ and PARKER, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

s/ Robert M. Parker
United States Circuit Judge

REHG-2

APPENDIX B.

U.S. COURT OF APPEALS
FILED
OCT 06 1998
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 98-10034

Summary Calendar

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

VERSUS

NATIONSBANK OF GEORGIA, NA; and JOHN LITZLER,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
(3:96-CV-2630-G)

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

Appellant Rebecca J. Brown ("Brown") appeals from the district court's grant of summary judgment in favor of Defendants/Appellees, Nationsbank of Georgia ("Nationsbank") and John Litzler ("Litzler"). Her claims stem from the termination of a retirement plan of which the appellees were trustees. Finding no reversible error, we affirm.

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Background and Procedural History

Brown was an employee of Wyatt Cafeterias, Inc. and had accumulated benefits pursuant to Wyatt's employee stock ownership plan ("the ESOP"). Under the ESOP, employees were allocated Wyatt stock based on company contributions to the ESOP and the employees' salaries. During appellees term as trustees for the ESOP, Wyatt stock dropped from around $84.00 per share to virtual worthlessness. Once the stock became worthless, the ESOP was left with no assets and was therefore terminated. Appellant brought this action individually and on behalf of other beneficiaries of the ESOP, alleging that the appellees had committed fraud and breached their fiduciary duties as trustees of the ESOP.

Originally filed in state court as a state-law fraud cause of action, the appellees removed the case to federal district court based on ERISA preemption. At the district court, appellees then filed motions to dismiss or, in the alternative, for summary judgment. The court granted appellees motion to dismiss Brown's claims for compensatory and punitive damages for failure to state a claim on which relief could be granted under ERISA. However, because neither party had squarely addressed the availability of equitable relief, the court withheld ruling on appellees, motions until the parties had briefed that issue Appellees submitted their brief as directed, but Brown instead filed a motion for leave to amend her complaint. Before the court could rule on Brown's motion for leave, Brown filed her amended complaint and amended motion for class certification. Brown maintained that leave of court was not required if the appellees hadn't yet filed a responsive pleading. After the deadline to respond to appellees brief had passed, the court granted appellees motion for summary judgment.

II. Discussion

After reviewing the record before us and the applicable law, we conclude that the district court's granting of summary judgment on behalf of the Defendants/Appellees should be affirmed.

Summary judgment is appropriate when the summary judgment record demonstrates "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a

matter of law." FED. R. Civ. P. 5 6 (c) In reviewing the district court's grant of summary judgment, we apply a de novo standard of review. See Rodriquez v. Pacificare of Texas, Inc., 980 F.2d 1014, 1019 (5th Cir. 1993).

Brown asserts that the district court erred in classifying the claims in her amended complaint as legal rather than equitable relief. "Equitable relief" under ERISA includes "those categories of relief which were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993). Regardless of the language used to characterize a claim, the claim is one for damages if it seeks monetary relief for losses an ERISA plan sustained as a result of an alleged breach of fiduciary duties. See Id. at 255; see also, Weir v. Federal Asset Disposition Assn., 123 F.3d 281, 290-91 (5th Cir. 1997). Accordingly, we agree with the district court's conclusion that Brown has simply tried to re-characterize an obvious claim for damages in the language of equity.

Next, Brown asserts that the district court erred in ruling that her claims did not set forth permissive relief under ERISA. Specifically, she argues that monetary damages relief is available to an ERISA plan, based on Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (holding that extra- contractual or punitive damages are not available to a beneficiary of an ERISA plan, but declining to rule on whether they would be available on behalf of the plan itself). This argument fails for two reasons. First, there is no longer a plan for which Brown would be able to recover "on behalf of," under ERISA §409 (a) , as she is no longer a participant in an existing plan. *See* Sanson v. General Motors, 966 F.2d 618, 621 (11th Cir. 1992)(noting that individuals that lose their status as a participant or beneficiary of a plan can no longer recover on behalf of the plan). Second, the Supreme Court has held that monetary damages (i.e., legal relief) are not available under ERISA §502(a)'s carefully crafted civil enforcement provisions. *See* Mertens, 508 U.S. at 255 (holding that compensatory damages--monetary relief for losses a plan sustained as a result of an alleged breach of fiduciary duties--were the classic form of legal relief). Because it is clear that Brown is seeking precisely the same classic form of legal

relief referred to in Mertens, and not equitable relief such as restitution or injunction, the district court correctly ruled that Brown's claims did not set forth permissive relief under ERISA.

In Brown's final point of error, she asserts that the district court erred in granting summary judgment without affording her the opportunity to amend pursuant to Fed. R. Civ. P. 15. Brown' s basis for this argument is that neither of the appellees had filed a responsive pleading prior to the filing of her amended complaint. While Brown is correct that neither a motion to dismiss nor a motion for summary judgment constitutes a responsive pleading such to extinguish a plaintiff's right to amend a complaint, see Zaidi v. Ehrlich, 732 F.2d 1218, 1219-20 (5th Cir. 1984), this does not afford her relief in this case.

It is clear from our review that the district court specifically considered the claims in Brown's amended complaint when granting appellees, motion for summary judgment. Having thus been allowed to fully present her arguments to the court, it would serve no valid purpose to allow Brown another attempt in vain to further cloak her original damages claims into the language of equity.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED DEC 9 1997
Nancy Doherty, Clerk
Entered on Docket
Dec 10 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,
Plaintiff,

VS.

NATIONSBANK OF GEORGIA, N.A., and JOHN LITZLER,
Defendants.

CIVIL ACTION NO.

3:96-CV-2630-G

MEMORANDUM ORDER

Before the court is the supplemental brief of the defendants, NationsBank of Georgia, N.A. and John Litzler (collectively, "defendants"), on their alternative motion for summary judgment. For the following reasons, the defendants' alternative motion for summary judgment is granted.

I. BACKGROUND

This court's memorandum order of September 11, 1997 ("Preemption Order"), denying Brown's motion to remand, contains a detailed discussion of the facts of this case. That discussion is incorporated here by reference.

By a memorandum order dated October 1, 1997 ("Damages Order"), the court granted the defendants' motion to dismiss Brown's claims for compensatory and punitive damages. By the same order, the court denied the defendants' motion to dismiss Brown's claims for equitable relief. The court withheld ruling on the defendants' alternative motion for summary judgment, concluding that the motion was premature. Because neither party had squarely addressed the availability of equitable remedies, the court reserved decision and directed the parties to submit briefs addressing this issue. The defendants submitted their brief as directed on October 21, 1997. Instead of responding to this brief, however, Brown filed a motion for leave to amend her complaint and to amend her motion for class certification. Before the court could rule on Brown's motion for leave, Brown filed her amended complaint and amended motion for class certification.[1] The time to respond to the defendants' brief under this court's local rules has now passed.

II. ANALYSIS

A. Evidentiary Burdens on a Motion for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. 56(c). A movant for summary judgment makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues to support the nonmovant's case. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty*

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[1] The circuit has generally not approved the amendment of pleadings to avoid a pending motion for summary judgment. See *Little v. Liquid Air Corporation*, 952 F.2d 841, 846 n.2 (5th Cir. 1992) and cases cited therein. This portion of the panel decision was specifically upheld by the *en banc* court. *Little v. Liquid Air Corporation*, 37 F.3d 1069, 1074 n.8 (5th Cir. 1994) *(en banc)*.

Lobby, Inc., 477 U.S. 242, 248 (1986).

Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. To carry this burden, the nonmovant must show more than some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Rather, the nonmovant must present evidence sufficient to support a resolution of the factual issues in her favor. *Anderson*, 477 U.S. at 257. The nonmovant cannot survive a motion for summary judgment by resting on the allegations in her pleadings. *Isquith for and on behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 199 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988); see also *Celotex*, 477 U.S. at 324. Although the court may not enter a default summary judgment by virtue of Brown's failure to respond, it may accept as undisputed the facts so described in the defendants' brief. See *Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988).

The trial court is given wide discretion to determine the timing of a motion for summary judgment. *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 893 (6th Cir. 1991); *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1193-94 (5th Cir. 1986). A party may not be "railroaded" by a premature motion for summary judgment. See *Celotex*, 477 U.S. at 322, 326. But so long as the trial court affords the parties adequate notice and adequate opportunity to develop their evidence, the court need not permit any discovery before ruling on a summary judgment motion. *United States v. Bloom*, 112 F.3d 200, 205 n. 17 (5th Cir. 1997); *Washington v. Allstate Insurance Company*, 901 F.2d 1281, 1285 (5th Cir. 1990).

Brown originally brought her claims in Texas district court in August of 1996. Notice of Removal at 1. The defendants removed this case to federal court shortly thereafter. See id. The defendants filed their motion to dismiss or, in the alternative, for summary judgment in October of 1996. *See generally* Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment. In October 1997, the court granted the defendants' motion in part and denied it

in part, directing the parties to submit summary judgment briefs addressing the availability of equitable remedies. Damages Order at 5-6. The defendants' have submitted a brief as directed, but Brown has chosen not to avail herself of the opportunity to respond. In light of these facts, the court finds that the parties have received adequate notice of the motion and adequate opportunity to develop their evidence. Therefore, the defendants' motion for summary judgment is ripe for decision. See Bloom, 112 F.3d at 205 n. 17; *Washington, 901* F.2d at 1285.

B. Equitable Remedies under ERISA

Brown's claims, originally pleaded as common-law fraud, are governed exclusively by ERISA. Preemption Order at 5-8. ERISA allows certain private individuals to enforce its provisions by bringing civil actions. *See generally* 29 U.S.C. § 1132 (a).[2] Although an individual litigant may not recover at law under ERISA, *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134, 144 (1985), a court may award individual equitable relief if appropriate. *Varity Corporation v. Howe,* U.S.116 S. Ct. 1065, 1079 (1996). "Equitable relief" under ERISA includes those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."

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[2] This section states in pertinent part:

A civil action may be brought-

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief [to the plan for breach of fiduciary duty];

(3)by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan ....

29 U.S.C.1132(a).

Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993). Regardless of the language used to characterize a claim, the claim is one for damages if it seeks monetary relief for losses an ERISA plan sustained as a result of an alleged breach of fiduciary duties. Id. at 255; see also *Weir v. Federal Asset Disposition Assn.,* 123 F.3d 281, 290-91 (5th Cir. 1997).

Brown's original petition sought to recover actual and punitive damages from the defendants for an alleged breach of fiduciary duty. Plaintiff's Original Petition at 11-12, attached as exhibit A to Notice of Removal. But Brown cannot recover individual damages from the defendants. Damages Order at 4; see also *Russell,* 473 U.S. at 144. Therefore, Brown filed an amended complaint, recasting her-claims as ones for "mandatory injunctive relief to enjoin Defendants to make good the value of the ESOP (Plan)." Memorandum of Authorities in Support of Motion for Leave to File Amended Complaint and Amended Motion for Class Certification at 3. Brown now requests the imposition of a constructive trust in the amount of $156,260,000.00 -- the original purchase price of 2,000,000 shares of Wyatt Cafeterias, Inc. stock. First Amended Complaint--Class Action at 27-28.

The defendants, in their brief, argue that no equitable relief is appropriate in this case. *See generally* Defendants' Brief Addressing Availability of Equitable Remedies. The defendants note that here, unlike *Varity*, there is no existing, alternative ESOP in which to reinstate Brown. Id. at 2-3. The defendants also allege that there are no "'ill-gotten plan assets or profits"' at issue that would justify an order of restitution. Id. at 6 (quoting *Mertens,* 508 U.S. at 260). Rather, the defendants maintain, damages at law are the substance of Brown's claims, regardless of the form in which she presents them. Id. at 5.

The court agrees. First, a claim for monetary compensation by any other name is still a claim at law. *Mertens,* 508 U.S. at 255; Cf. William Shakespeare, Romeo and Juliet act 2, sc. 2 ("What's in a name? That which we call a rose By any other name would smell as sweet."). Brown's amendment is an awkward and futile attempt to cloak an obvious claim for damages in the language of equity. Second, even if Brown's request for a constructive trust stated a

claim in equity, she has failed to provide evidence of a fact issue regarding unjust enrichment, an essential element of the claim. *See* 5 Austin W. Scott, The Law of Trusts § 462.2 (1967) ("A constructive trust ... is imposed in order to prevent unjust enrichment."). Therefore, summary judgment in favor of the defendants is proper. *Celotex*, 477 U.S. at 322-23 (summary judgment proper where plaintiff fails to establish existence of essential element as to which she will bear the burden of proof at trial).

III. CONCLUSION

For the reasons stated above, the defendants' motion for summary judgment is **GRANTED.**

SO ORDERED.

December 9, 1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED DEC 9 1997
Nancy Doherty, Clerk
Entered on Docket
Dec 10 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,

Plaintiff,

vs.

NATIONSBANK OF GEORGIA, N.A. and JOHN LITZLER,

Defendants.

CIVIL ACTION NO.

3:96-CV-2630-G

JUDGMENT

This judgment is entered pursuant to F.R. Civ. P. 58 and the memorandum orders of September 11, 1997, October 1, 1997, and this date. For the reasons stated in those memorandum orders, it is **ORDERED** that the plaintiff take nothing from the defendants on her claims in this case and that the defendants recover their costs of court.

December 9, 1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX E.

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED DEC 10 1997
Nancy Doherty, Clerk
Entered on Docket
Dec 11 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, ET AL.,
Plaintiffs,

CIVIL ACTION NO.

3:96-CV-2630-G

VS.
NATIONSBANK OF GEORGIA, N.A.
and JOHN LITZLER,
Defendants.

ORDER

Defendants' motion to strike for failure to comply with court-ordered briefing is **DENIED** as moot.

SO ORDERED.

December 9 ,1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED OCT 1 1997
Nancy Doherty, Clerk
Entered on Docket
Oct 2 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,

Plaintiff,

vs.

CIVIL ACTION NO.

3:96-CV-2630-G

NATIONSBANK OF GEORGIA, N.A. and JOHN LITZLER,

Defendants.

MEMORANDUM ORDER

Before the court is the motion of defendants NationsBank of Georgia, N.A., and John Litzler (collectively, "defendants") to dismiss or, in the alternative, for summary judgment on the claims asserted by the plaintiff Rebecca Brown ("Brown") for herself and others similarly situated. For the reasons stated below, the motion to dismiss is granted as to Brown's claims for compensatory and punitive damages but denied as to her claims for equitable relief. The court reserves decision on the motion for summary judgment, and the parties are directed to submit further briefs on the question whether equitable relief is available to Brown if she establishes that the defendants breached their fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29

U.S.C. H *1001 et seq.*

1. BACKGROUND

This court's memorandum order of September 11, 1997 ("Preemption Order"), denying Brown's motion to remand, contains a detailed discussion of the facts of this case. That discussion is incorporated here by reference.

II. ANALYSIS

A. Dismissal for Failure to State a Claim -- Rule 12(b)(6)

Fed. R. Civ. P. 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted. " A motion under Rule 12 (b) (6) should be granted only if it appears beyond doubt that the plaintiff could prove no set of facts in support of her claim that would entitle her to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Leffall v. Dallas Independent School District,* 28 F.3d 521, 524 (5th Cir. 1994) (citations omitted). The court must accept all well-pleaded facts as true and view them in the light most favorable to the non-movant. *Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc.,* 30 F.3d 627, 629 (5th Cir. 1994) (citation omitted); *Norman v. Apache Corporation,* 19 F.3d 10 17, 1021 (5th Cir. 1994) (citations omitted); Chrissy F. *by Medley v. Mississippi Department of Public Welfare,* 925 F.2d 844, 846 (5th Cir. 199 1). Thus, in deciding the defendants' motion, the court must assume the truth of Brown's allegations.

Contrary to Brown's assertion, a court may rule on dispositive motions in a putative class action prior to class certification. See, e.g., Floyd v. *Bowen,* 833 F.2d 529, 534 (5th Cir. 1987). Rule 23(e) restricts the *voluntary* dismissal or compromise of an actual or potential class action by *the parties,* not the *involuntary* dismissal of an action by *the court. Shelton v. Pargo, Inc.,* 582 F.2d 1298, 1300 n. I (4th Cir. 1978); Charles A. Wright et al., Federal Practice and Procedure § 1797 at 345-46 (1986) ("Another exception to the mandatory notice requirement in Rule 23(e) occurs when the dismissal is not voluntary."). Therefore, the court concludes that the defendants' motion to dismiss is ripe for decision.

B. ERISA Preemption

In the Preemption Order, this court held that Brown's claims, pleaded as common-law fraud, are governed exclusively by ERISA. Preemption Order at 5-8. ERISA allows certain private individuals to enforce its provisions by bringing civil actions. *See generally* 29 U.S.C. § 1132(a). This section states in part:

> A civil action may be brought–
>
> * * *
>
> (2)by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief [for breach of fiduciary duty];
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

.... Id. A private litigant may not recover individual compensatory or punitive damages under §1 132(a)(2). *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134, 144 (1985). Rather, the individual claimant must recover on behalf of the plan. 29 U.S.C. § 1109(a) (fiduciaries liable "to such plan" for damages caused by their breach); see also *Russell,* 473 U.S. at 142. However, a court may award an individual appropriate equitable relief under § 1 132(a)(3). *Varity Corporation v. Howe,* __ *U.S.* 116 S.Ct. 1065, 1079 (1996).

It is undisputed that Brown was a beneficiary under the Wyatt and Triangle ESOP and that the defendants were plan fiduciaries. Brown alleges that the defendants misrepresented the characteristics of the ESOP, thereby fraudulently inducing her to remain in the employ of Wyatt without making alternative retirement plans. Plaintiff 's Original Petition at 9- 10, attached as Exhibit A to Notice of Removal. Proof of these allegations could not entitle Brown to recover individual compensatory or punitive damages under ERISA. See *Russell,* 473 U.S. at 144. Therefore, the court

must dismiss Brown's claims for damages because she has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). However, the alleged facts might, if proven, support a claim of breach of fiduciary duty entitling Brown to appropriate individual equitable relief. See *Varity*, __ U.S.__ , 116 S.Ct. at 1078. Because the facts as pled might entitle Brown to equitable relief, dismissal of her claim for relief in equity is inappropriate. See *Leffall*, 28 F.3d at 524. Summary judgment on Brown's equitable claims is also premature because neither side has squarely addressed this issue. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24 (1986) (requiring a movant for summary judgment to inform the court of the basis of his motion and identify the portions of the record which reveal there are no genuine issues of material fact and the nonmovant then to direct the court's attention to evidence in the record sufficient to establish a genuine issue of material fact for trial). Therefore, the court withholds decision on Brown's equitable claims pending the submission of briefs on this issue.

III. CONCLUSION

The defendants have carried their burden to show that Brown could prove no set of facts in support of her claim for individual compensatory and punitive damages that would entitle her to relief. Accordingly, the motion to dismiss the claim for compensatory and punative damages for failure to state a claim is **GRANTED.** The defendants have not carried their burden, however, as to Brown's claim for equitable relief. Therefore, the motion to dismiss the claim for equitable relief is **DENIED.**

SO ORDERED.

October 1, 1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX G.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED SEP 11 1997
Nancy Doherty, Clerk
Entered on Docket
Sep 12 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,

Plaintiff,

VS.

NATIONSBANK OF GEORGIA, N.A., and JOHN LITZLER,

Defendants.

CIVIL ACTION NO.

3:96-CV-2630-G

MEMORANDUM ORDER

Before the court is the motion of plaintiff Rebecca J. Brown ("Brown") to remand this action to a state district court from which it was previously removed. For the following reasons, the motion is denied.

I. BACKGROUND

Brown, a resident of Dallas County, Texas, was an employee of Wyatt Cafeterias, Inc. ("Wyatt") for seventeen years. Plaintiff's Original Petition ("Petition") at 1, attached to the Notice of Removal as Exhibit A. During her employment, Brown accumulated benefits pursuant to the Wyatt Cafeterias, Inc. Employee Stock Ownership Plan ("Wyatt ESOP") and its successor program, the Triangle Foodservice Inc. Employees Stock Ownership Plan ("Triangle

ESOP") (collectively, the "ESOP").[1] Id. Under the ESOP, employees were allocated Wyatt stock based on company contributions to the ESOP and the employee's salary. Summary Plan Description at 1, attached to the Notice of Removal as Exhibit B.

Defendant NationsBank of Georgia, N.A. ("NationsBank") is a foreign corporation doing business in Texas. Petition at 2. NationsBank served as trustee of the Wyatt ESOP from January 1, 1988 to July 21, 1995. Affidavit of Ernest F. Ritter in Support of Defendants' Response ("Ritter Affidavit") ¶ 4.

Defendant John Litzler ("Litzler") is a resident of Dallas County, Texas. Petition at 3. Litzler is the successor trustee of the ESOP, and he served from July 21, 1995, until the termination of the ESOP. Ritter Affidavit ¶ 5.

While serving as trustee to the ESOP, NationsBank began closing Wyatt cafeterias. Plaintiff's Reply Brief at 2. With the closing of approximately one quarter of Wyatt's cafeterias, Wyatt stock dropped in value from $84.00 per share on August 5, 1988, to $.48 per share on May 7, 1993. Petition at 7-9. By 1995, Wyatt stock was worthless, leaving the ESOP with no assets, and on December 31, 1995, the ESOP was formally terminated Id. at 2.

On August 9, 1996, Brown filed this suit in the 14th Judicial District Court of Dallas County, Texas. Brown alleges that the defendants disseminated information which misrepresented the characteristics of the ESOP, thereby fraudulently inducing her to remain in the employ of Wyatt without making alternative plans for retirement distributions. Petition at 9-10. As relief, Brown seeks the creation of a $428 million common fund to benefit herself and members of the class. Id. at 12.

Upon removal of the case to this court on September 17, 1996, Brown promptly filed the instant motion in which she contends that removal was improper because (1) the defendants'

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[1] Brown brings this action individually and on behalf of (1) employees of Wyatt and its related corporations, and (2) beneficiaries of the ESOP with active or vested accounts which did not lapse between January 1, 1988, and January 1,1996.Petition at 1.

notice of removal was defective, (2) the defendants voluntarily submitted to the jurisdiction of the state court, and (3) there are no federal claims and diversity of citizenship is lacking.

II. ANALYSIS

A. Was the Notice of Removal Defective?

Brown argues that the notice of removal was defective because, contrary to 28 U.S.C. § 1446(a),[2] it did not contain (1) a copy of a letter from her counsel to the defendants' counsel, or (2) a copy of Litzler's service of process. Because the letter is not a process, a pleading, or an order, however, it was not required, by the terms of § 1446(a), to be filed with the notice of removal. Moreover, although the citation served on Litzler was not originally included, the defendants later supplemented their notice of removal with a copy of that process. *See* Defendants' Supplement to Notice of Removal. Supplementation is allowed to cure defects in a notice of removal. See *Covington v. Indemnity Insurance Company of North America,* 251 F.2d 930, 933 (5th Cir.), *cert. denied,* 357 U.S. 921 (1958). This ground for remand must therefore be rejected.

B. Did the Defendants Voluntarily Submit to the Jurisdiction of the State Court?

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[2] 28 U.S.C. § 1446(a) provides in pertinent part:

> (a)A defendant or defendants desiring to remove any civil action ... from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal . . ., together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

Brown contends that the defendants submitted to the jurisdiction of the state court when they requested an extension of time to file their answer in that court. Plaintiff's Brief in Support of Motion ("Plaintiff's Brief") to Remand at 2. In this circuit, "[a] waiver of the right of removal must be clear and unequivocal." *Beighley v. Federal Deposit Insurance Corporation,* 868 F.2d 776, 782 (5th Cir. 1989). Because Brown has failed to show that the defendants in this case clearly waived their right to removal, the court cannot conclude that defendants have submitted to state court jurisdiction. Cf. *Warner v. Crum & Forster Commercial Insurance Company,* 839 F. Supp. 436, 439 (N.D.Tex. 1993) (defendant did not waive its right of removal merely by filing an answer and a motion to transfer venue before filing a notice of removal).

C. Does ERISA Preempt Brown's Claims?

Brown asserts that the defendants cannot remove this action to federal court because she has chosen to proceed solely on claims grounded in state law, Plaintiffs Brief at 3, while the defendants argue that the Employee Retirement Income Security Act, 29 U.S.C. §§ 100 1 *et seq.* ("ERISA"),[3] pre-empts Brown's state claim and provides the basis for removal. Under the well-pleaded complaint rule, a case is not removable where the complaint asserts only state law causes of action. *Kramer v. Smith Barney,* 80 F.3d 1080, 1082 (5th Cir. 1996) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 10 (1983)). The pre-emption doctrine, however, carves out an exception to this rule: "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Insurance Company v. Taylor,* 481 U.S. 58, 63-64 (1987). Such statutory pre-emption "converts an ordinary state common law complaint into one stating a federal claim for purposes of the wellpleaded complaint rule." Id. at 65.

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[3] The ESOP was established under the guidelines of ERISA. *See* Summary Plan Description: Employees' Stock Ownership Trust Agreement.

Congressional intent determines whether a federal statute pre-empts a state cause of action. *FMC Corporation v. Holliday,* 498 U.S. 52, 56 (1990). Any inquiry into such intent necessarily includes an examination of the statutory language and the structure and purpose of the statute taken in its entirety. Id. at 57. ERISA contains a pre-emption clause providing, in relevant part:

> Except as provided in subsection (b)[4] of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.

29 U.S.C. § 1144(a).

It is well settled that § 1144(a) is deliberately broad and expansive in its language and application. *Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321, 1328 (5th Cir.), *cert. denied,* 506 U.S. 1033 (1992). State causes of action are barred under § 1144(a) if

> (1) the state law claim addresses an area of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claim directly affects the relationship between the traditional ERISA entities-- the employer, the plan and its fiduciaries, and the participants and beneficiaries.

Hubbard v. Blue Cross & Blue Shield Association, 42 F.3d *942,* 945 (5th Cir.), *cert. denied,* 515 U.S. *1122* (1995).

Brown's fraudulent inducement claim addresses an area of exclusive federal concern. Brown alleges that the defendants fraudulently induced her to remain an employee of Wyatt through the dissemination of information which misrepresented that (1) the ESOP shares were "valuable property" belonging to her, as an "owner" of Wyatt, *(2)* the "valuable property" increases in value were for her benefit and enrichment as retirement distributions, with stock values increasing to $50.00 and $60.00 and $150.00 per share,

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[4] 29 U.S.C. § 1144(b) exempts certain state laws from pre-emption, but none of those exemptions is applicable here.

(3) Wyatt overcomes temporary adverse factors, explaining that its $.48 per share valuation was a substantial improvement over the immediately preceding book values, and (4) Wyatt would be in business 48 years from now. Petition at 5. These allegations require the court to examine and interpret the language of the instruments creating this ERISA-governed ESOP, the operation of the ESOP, and any communications made by the defendants to Brown concerning the terms of the ESOP.

The Fifth Circuit has reached the same conclusion in similar cases. For example, in *Christopher v. Mobil Oil Corporation,* 950 F.2d 1209 (5th Cir.), *cert. denied,* 506 U.S. 820 (1992), the plaintiff alleged that the defendants misrepresented the terms of an ERISA-governed employee benefit plan to induce the plaintiff to quit. Id. at 1217. The court held, however, that such a fraudulent inducement claim addressed an area of exclusive federal concern because consideration of the claim required the court to consider the language of the plan, operation of the plan, and communication about the terms of the plan. Id. at 1218.

Likewise in *Hubbard v. Blue Cross,* above, the plaintiff asserted that the defendant plan insurer induced the plaintiff to remain with an ERISA-regulated health benefits plan by withholding "secret guidelines" as to when benefits would be granted. *Hubbard,* 42 F.3d at 944. The court found that the fraudulent inducement claim addressed an area of exclusive federal concern since its resolution required an inquiry into the existence of the guidelines, whether the guidelines were used in the plaintiffs case, and whether the guidelines materially affected the determination of non-coverage in the plaintiffs medical treatment. Id. at 946.

In addition, Brown's fraudulent inducement claim directly affects the relationship between traditional ERISA entities. Brown, a beneficiary of the ESOP, asserts her claim against the defendants, who were fiduciaries of the ESOP. Accordingly, Brown's claim is pre-empted under § 1144(a).[5]

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[5] Brown also makes two unmeritorious arguments apart (continued...)

III. CONCLUSION

The defendants' notice of removal is not defective, the defendants have not submitted to state court jurisdiction, and removal is proper based on ERISA preemption of Brown's fraudulent inducement claim. Accordingly, Brown's motion to remand is DENIED.

SO ORDERED.

September 11, 1997.

S/ A. Joe Fish
A. JOE FISH
United States District Judge

(...continued)
from § 1144(a). First, Brown urges that pre-emption would leave her with no adequate remedy for the defendants' fraud. *See* Plaintiff's Reply to Defendants' Surreply at 1-3. However, § 1144(a) bars state law causes of action even though such pre-emption may leave a victim of fraud or misrepresentation without a remedy. *Hansen v. Continental Insurance Company,* 940 F.2d 971, 979 (5th Cir. 199 1) (citing *Lee v. E.I. DuPont de Nemours,* 894 F.2d 755, 757 (5th Cir. 1990)).

Brown also asserts that the Department of Labor's failure to take action upon her complaint filed with that department creates an inference that her claim is not pre-empted by ERISA. She argues that such an inference is warranted because, if her claim were pre-empted by ERISA, the department would have taken action on the complaint. Motion to Remand at 4; Plaintiff's Brief at 3-4. In fact, the Department of Labor wrote to Brown, in what appears to be a form letter, explaining that it was not pursuing her claim because of the limited resources of the department, not because of any issue of ERISA pre-emption. *See* U.S. Department of Labor Letter, Exhibit C to Plaintiff's Motion to Remand.

APPENDIX H.

STATUTORY PERTINENT TEXT - TITLE 28 U.S.C.

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

* * *

APPENDIX I.

STATUTORY PERTINENT TEXT - TITLE 29 U.S.C. (ERISA)

§ 1002. Definitions (ERISA §3)

For purposes of this subchapter:

* * *

(2)(A). . . the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

§ 1003. Coverage (ERISA §4)

(a) . . . this subchapter shall apply to any employee benefit plan if it is established or maintained-

(1) by any employer engaged in commerce or in any industry or activity affecting commerce;

* * *

§ 1104. Fiduciary duties (ERISA §404)

(a) Prudent man standard of care

(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * *

§ 1109. Liability for breach of fiduciary duty (ERISA §409)

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed

upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. . . .

* * *

§ 1132. Civil enforcement (ERISA §502)

(a) Persons empowered to bring a civil action

A civil action may be brought -

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

* * *

(d)(1) An employee benefit plan may sue or be sued under this chapter as an entity. Service . . . upon a trustee . . . shall constitute service upon the employee benefit plan . . . .

* * *

§ 1144. Other laws (ERISA §514)

(a) Supersedure; effective date

. . . the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *